

In addition to state SPA 124 and CWA 404 permits, this project may also potentially require a National Pollution Discharge Elimination System (NPDES) permit for temporary road construction with greater than one acre of disturbance. At this time it is uncertain whether this project will require a NPDES permit for haul road use, due to several factors.

In Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011) (“NEDC”), the Ninth Circuit Court of Appeals held that stormwater runoff associated with two logging roads that flows into systems of ditches, culverts, and channels before being discharged into forest streams and rivers is a point source discharge for which a National Pollutant Discharge Elimination System (NPDES) permit is required. The Court of Appeals then remanded to the district court for further proceedings consistent with its opinion. The State of Oregon and other parties filed petitions for certiorari with the U.S. Supreme Court to review the Ninth Circuit’s decision. The United States was not a party to litigation.

NEDC v. Brown involved a citizen suit; thus any available relief on remand would be limited to addressing the violation in question and is only binding on the involved parties. Because the USDA Forest Service was not a party, the Ninth Circuit's decision did not impose any affirmative duties on it. However the case has implications for federal land management agencies.

In response to NEDC v. Brown, the Environmental Protection Agency (EPA) issued a formal notice on March 23, 2012 in the Federal Register (77 FR 30473) indicating its intent to expeditiously propose revisions to its Phase I stormwater regulations (40 C.F.R. §122.26) to specify that stormwater discharges from logging roads are not stormwater discharges “associated with industrial activity.” The notice also states that EPA intends to further study and seek public comment on alternative approaches for addressing stormwater discharges from forest roads.

Additionally, following the Ninth Circuit's decision, Congress took legislative action suspending any potential permitting requirement imposed by the decision:

From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities.

Consolidated Appropriations Act, 2012, § 429, Pub. L. No. 112-74, 125 Stat. 786, 1046-1047 (Dec. 23, 2011). Thus, until September 30, 2012, no NPDES permits are required for stormwater discharges from roads associated with silvicultural activities.

Permanent legislation is also pending in both the U.S. Senate and the House of Representatives that would amend Section 402 of Clean Water Act to exempt stormwater discharges resulting from silvicultural activities from NPDES permit requirements.

Due to these factors, it is uncertain at this time whether any NPDES permitting requirements apply, or will apply in the future to stormwater discharges from logging roads. Should it be determined that an NPDES permit is required for this project, the Forest Service will comply with any applicable NPDES permitting requirements.